

CHOICE OF LAW AND THE UNIFORM COMMERCIAL CODE

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Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement [the Chapters of Ohio's Commercial Code] apply to transactions bearing an appropriate relation to this state.

This is the first paragraph of Ohio Revised Code section 1301.05¹ and is the principal section of Ohio's new Commercial Code which attempts to solve the problems involved in determining the territorial applicability of the Code. The second paragraph of section 1301.05 provides for certain exceptions to the broad language set out above by making reference to other sections of the Code in which five fairly narrow problems are treated specifically. This article will discuss the general section at some length and then briefly point up the solutions required by these other sections.

THE GENERAL SECTION

Ohio's new Commercial Code is an enactment of the Uniform Commercial Code. Thus, although this article will make specific reference to the Ohio Code, it will also cover choice of law problems under the corresponding sections of the Uniform Commercial Code.

The general section of the Uniform Commercial Code dealing with choice of law problems (as set out above) attempts to solve two types of commercial cases:

1. Those cases in which the parties have agreed as to the applicable law; and
2. Those cases in which the parties have not agreed as to the applicable law.

The first type of case is resolved by allowing the parties, when the transaction bears a "reasonable relation" to Ohio and to another jurisdiction, to agree that "the law" of one of those jurisdictions shall govern their rights and duties. This is a clear recognition of party autonomy in choice of law problems involving commercial transactions, placing the solution in the hands of the parties—provided that the "reasonable relation" is found to exist.

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¹ This section corresponds to Uniform Commercial Code § 1-105 [hereinafter cited as UCC].

The second type of case is solved by applying the Ohio Commercial Code if the transaction bears an "appropriate relation" to Ohio.² No mention is made of cases in which the parties have not agreed as to the applicable law and the transaction does not bear an "appropriate relation" to Ohio. Presumably, these are to be solved by reference to the traditional choice of law rules.³ Because of the breadth of the term "appropriate relation" (thus bringing most cases within the sweep of the Commercial Code), this problem may not be of any great practical significance.

1. *Party Autonomy*

a. The Choice of Law Clause

Undoubtedly, the biggest change between the commonly understood choice of law rules and section 1301.05 is found in the idea that the parties may agree as to the applicable law which will govern their rights and duties. Choice of law rules grew under a concept of territorial sovereignty—that a tort or a contract was *located* in some jurisdiction and that only the jurisdiction of its location had the *power* to make the rules which determined the rights and duties of the parties involved in the tort or contract.⁴ The Restatement of Conflict of Laws (1934) proceeds on this assumption.⁵ Judge Learned Hand expressed this idea most forcefully when he said:

People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.⁶

² This approach—that is, the application of forum law whenever there has been no effective choice of law agreement and the transaction bears an "appropriate relation" to the forum—will be the approach of every state which has adopted the Uniform Commercial Code because UCC § 1-105 states: "... Failing such agreement [*this Act* applies] to transactions bearing an appropriate relation to *this state*." (Emphasis added.)

³ See 9 Ohio Jur. 2d *Conflict of Laws* §§ 61-65; Stumberg, *Conflict of Laws* 224-279 (2d ed. 1951).

⁴ See the excellent discussion and survey in Yntema, "Contract and Conflict of Laws: 'Autonomy' in Choice of Law in the United States," 1 N.Y.L.F. 46 (1955).

⁵ See, e.g., Restatement, *Conflict of Laws* §§ 332-340, 377-381 (1934).

⁶ *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931). See also Comment, *The Uniform Commercial Code and Conflict of Laws*, 9 Am. J. Comp. L. 458 (1960).

Judge Goodrich, in his hornbook on Conflict of Laws, used equally strong language against party autonomy when the validity of a contract was involved.⁷

If this concept of territorial sovereignty ever was the law in this country, it is clear that today it has been thoroughly discredited. Under the leadership of Professor Walter Wheeler Cook, the "logic" advanced to support the principle of sovereignty as a basis for choice of law rules was challenged—and demolished.⁸ Today, law review writers⁹ and courts¹⁰ recognize that there is nothing illogical about allowing the parties to have something to say about which law will be used to determine their rights and obligations. Even Judge Hand's court has now repudiated the position that party autonomy is somehow illegal. In *Siegelman v. Cunard White Star, Ltd.*,¹¹ the court upheld a contract ticket which referred all questions arising on the contract to the law of England. There, Judge Harlan remarked:

Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems resolving ambiguities. . . . [A] tendency toward certainty in commercial transactions should be encouraged by the courts.¹²

⁷ "This [intended law] rule, though frequently enunciated, bristles with difficulties, theoretical and practical. As said above, a contract is the result of the application of legal rules upon the acts of the parties. How can they displace the law of the place where their acts are done by exercise of any choice of their own?" Goodrich, *Conflict of Laws* 326 (3d ed. 1949). See also Beale, "What Law Governs the Validity of a Contract," 23 *Harv. L. Rev.* 1, 79, 194, 260 (1909).

⁸ Cook, *The Logical and Legal Bases of the Conflict of Laws* 389-432 (1942). This chapter was originally published in 32 *Ill. L. Rev.* 899 (1938) and 34 *Ill. L. Rev.* 423 (1939) under the title, "'Contracts' and the Conflict of Laws: 'Intention' of the Parties."

⁹ See, e.g., Nussbaum, "Conflict Theories of Contracts: Cases Versus Restatement," 51 *Yale L.J.* 893 (1942); Ehrenzweig, "Adhesion Contracts in the Conflict of Laws," 53 *Colum. L. Rev.* 1072 (1953); Yntema, *supra* note 4; James, "Effects of Autonomy of the Parties on Conflict of Laws Contracts," 36 *Chi.-Kent L. Rev.* 34 (1959).

¹⁰ See, e.g., *Duskin v. Pennsylvania-Central Airlines Corp.*, 167 F.2d 727 (6th Cir. 1948); *Ringling Bros. Barnum & Bailey Combined Shows v. Olvera*, 119 F.2d 584 (9th Cir. 1941). A later decision in the *Olvera* case is reported in 154 F.2d 497 (9th Cir. 1946).

¹¹ 221 F.2d 189 (2d Cir. 1955). The holding of the case may be criticized because of (1) the court's interpretation of the particular clause involved and (2) the fact that the actual contract was a take-it-or-leave-it contract. This does not detract from the court's basic approach to party autonomy, but may indicate that this was not a proper case in which to apply the approach.

¹² Tentative Draft No. 6 (1960) of the Restatement (Second), *Conflict of Laws* adopts the idea of party autonomy. See §§ 332-346d.

Thus, while the idea of party autonomy in choice of law selection is far from new in this country,¹³ the fact that the Uniform Commercial Code recognizes that parties can choose the law to govern their rights and duties will give impetus to its wider acceptance. Specifically, section 1301.05 gives to each lawyer the right to draft in all of his commercial contracts covered by the Code—with the exceptions noted later—a clause selecting the law to be applied to the rights and duties created by its terms. This will allow lawyers to plan transactions as they have never before been able to plan them. Once the Code is adopted in all fifty states, lawyers should be able to predict, at the time the agreement is signed, just which law will be used to determine the rights and duties of their clients—and predictability is one of the foundations on which wise choice of law rules should rest.¹⁴

The choice of law clause must be drafted with the same care as any other complicated clause in the agreement. There can no more be a successful standard form for this provision than there can be for the other paragraphs of the contract. Perhaps a provision can be drafted that will “work”—that is, solve the problem of choice of law without expensive litigation—in a majority of cases. Such a provision can be taken from the statutory language. The language chosen may not, however, produce the results which the parties expected either because it does not encompass all of the problems they wanted covered or, conversely, it may encompass more problems than they expected. For example, the parties (with the help of their attorneys) should determine whether the selected law should be used to measure the essential validity of the agreement (such matters as signature, capacity, and legality), the interpretation of the agreement, the existence of implied warranties, the time when title passes, the measure of performance, and excuses for nonperformance. After they determine just what problems they want covered, they must then carefully choose precise language to solve those problems.

Even the simplest language can cause difficulties. Throughout this article, the words “the law” are used. The same two words are found in section 1301.05, where it is stated that the parties may agree as to

¹³ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825); *Pritchard v. Norton*, 106 U.S. 124 (1882). Story's early treatise in *Conflict of Laws* justified the *lex solutionis* rule as being, in certain cases, “in conformity to the presumed intention of the parties.” Story, *Conflict of Laws* § 280 (1st ed. 1834). Ehrenzweig states that American law “has always permitted parties to a contract to ‘legislate’ in this fashion by expressly stipulating the applicable law.” Ehrenzweig, *supra* note 9, at 1074. See discussion in 2 Rabel, *The Conflict of Laws: A Comparative Study* 368-387 (1st ed. 1947).

¹⁴ Cheatham and Reese, “Choice of the Applicable Law,” 52 *Colum. L. Rev.* 959 (1952). Nine policies are listed. Predictability is discussed at 969-970.

"the law" that will govern their rights and duties. Those words are ambiguous. Do they refer only to the local law of the selected jurisdiction (that is, "the law" which that jurisdiction would have applied had all the facts occurred within that jurisdiction—which a moment's reflection will indicate is a purely hypothetical case), or do they refer to the *whole* law of the selected jurisdiction (that is, "the law"—including the choice of law rules—which that jurisdiction would have applied to the facts as they actually occurred)? Courts have had difficulty construing those two words.¹⁵

Difficult problems yet to be determined by the courts include whether section 1301.05 can be used to reach an effective agreement as to the law to be applied (1) in measuring whether the form of the agreement satisfies the Statute of Frauds and (2) in limiting or expanding the remedies available on breach. Remedies (and, in some states, Statute of Frauds questions) have traditionally been matters for the forum to decide as touching the "procedure" and not the "substance" of the case.¹⁶ Certainly, the Code should be interpreted to make the parties' choice in these areas effective; however, court decisions interpreting the language of this section of the Code will be needed.

b. The Reasonable Relation Test

This autonomy to select applicable law is limited by the requirement that the transaction bear a "reasonable relation" to the jurisdiction whose law has been chosen.¹⁷ All kinds of contacts will be asserted

¹⁵ See discussion in *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955); *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.* [1939] A.C. 277 (P.C.) (Newfoundland). The words in the statute would probably be construed to mean the internal law of the jurisdiction selected because in other places in the Code, reference is made to "the law, including the conflict of laws rules" of the applicable jurisdiction. Ohio Rev. Code §§ 1308.05, 1309.03, 1301.05 (1962) (UCC §§ 8-106, 9-103, 1-105). However, an individual contract may cause construction problems if not carefully drafted. Rabel concludes that "all writers seem to agree that parties stipulating for an applicable law intend to apply the municipal law without renvoi." 2 Rabel, *op. cit. supra* note 13, at 387.

¹⁶ See discussion of the Statute of Frauds in *Lams v. F. H. Smith Co.*, 36 Del. 477, 178 Atl. 651 (1935). Ohio has held its Statute of Frauds to be "procedural" rather than "substantive." *Heaton v. Eldridge & Higgins*, 56 Ohio St. 87, 46 N.E. 638 (1897).

¹⁷ The Code could be interpreted more narrowly than this. Ohio Rev. Code § 1301.05 (1962) requires that a transaction have a "reasonable relation" to Ohio *and* also to another jurisdiction as a prerequisite to party choice of the applicable law. A commercial contract having reasonable relations to several states other than Ohio might have a choice of law clause selecting the law of one of these jurisdictions. If such a contract were to come before an Ohio court, the first section of § 1301.05 would not be applicable because the transaction had no contact with Ohio. Its contacts were solely with other states. The clause selecting the applicable law should, however, be upheld

as the basis of a "reasonable relation" to a state. In keeping with the spirit of the section, the courts should apply the section liberally and uphold the parties' choice unless that choice is plainly unreasonable. Perhaps, though, judges who cling to ideas of sovereignty as a basis for choice of law will find such a liberal approach intolerable.

The Official Code Comment to this section of the Uniform Commercial Code states that, "In general, the test of 'reasonable relation' is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.* . . . Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."¹⁸ In the *Seeman*¹⁹ case, the Supreme Court of the United States held that a commercial loan, attacked on the basis that the interest rate was usurious, would be upheld if the loan was valid either at the place of making or at the place of performance. The Court added a qualification to this rule—and it is this qualification to which the Official Code Comment is evidently referring (274 U.S. at 408):

. . . [T]he parties must act in good faith The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject.

We now have two adjectives in place of one. The relation must be "reasonable" according to the Code; it must be "normal" according to the case referred to by the Official Code Comment.²⁰ Until courts have interpreted these words—"reasonable relation"—neither adjective is of much aid to the lawyer. It is believed that either the place of making or of performance has a "reasonable relation"; however, courts will have to decide whether such contacts as the domicile of one or both of the parties, the place of the offer, the place from which the goods are to be shipped, the place of business of one or both of the

either by: (1) a liberal construction of § 1301.05; (2) an Ohio choice of law rule affirming party autonomy in all commercial contract cases; or (3) acceptance of the whole law (including the conflicts of laws rules) of the jurisdiction referred to by Ohio's choice of law rule.

¹⁸ The Code, the Official Code Comment and an Author's Commentary are included in Anderson's Uniform Commercial Code (1961).

¹⁹ *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927).

²⁰ For other possible ways of restating the phrase "reasonable relation," see Cullen, "Conflict of Laws Problems Under the Uniform Commercial Code," 48 Ky. L.J. 417 (1960).

parties, or the situs of property are—in and of themselves—reasonable relations to the jurisdiction in which they occur.²¹

Two pre-Code cases should be helpful in interpreting the Code. One is *Green v. Northwestern Trust Co.*²² in which notes were made in Minnesota and were to be paid there. The court, however, applied the law of Montana because (among other contacts) the land securing the notes was located in Montana. Here the law selected was neither the place of making nor performance. The other case is *Brierly v. Commercial Credit Co.*²³ where a loan transaction had contacts with Maryland and Pennsylvania. A provision in the contract selected the law of Delaware as the governing law. This provision was denied effect because the only relation to Delaware was that the defendant was incorporated there.²⁴ The contact with the jurisdiction must be a "reasonable" one before the selection of that law will be upheld under section 1301.05.

The Code does not indicate any exceptions (except those listed in the second paragraph of section 1301.05) to the right of the parties to select the applicable law—if the law selected has the required reasonable relation. There are, however, two exceptions which will undoubtedly be read in by the courts:

1. The law selected will not bind third parties to the transaction. In a recent Pennsylvania case,²⁵ the contract was executed in Pennsylvania but contained a clause providing that New York law was to govern the "agreement and performance thereof." The transaction had contacts with both Pennsylvania and New York. The court stated that the clause was binding as between the parties but held that rights of creditors were not affected by the clause. Pennsylvania law was applied, the court citing

²¹ Cases involving the validity and effect of a stipulation in a contract that the contract shall be governed by the law of a state which is neither the place where the contract was made nor the place where it was to be performed are collected in Annot., 112 A.L.R. 124 (1938).

²² 128 Minn. 30, 150 N.W. 229 (1914).

²³ 43 F.2d 724 (E.D. Pa. 1929), *aff'd*, 43 F.2d 730 (3d Cir. 1930), *cert. denied*, 282 U.S. 897 (1931).

²⁴ See Note, "Fraud on the Law—the Doctrine of Evasion," 42 Colum. L. Rev. 1015 (1942). Another pre-Code case (but referring to the Code) is *Maxwell Shapiro Woolen Co., Inc. v. Amerotron Corporation*, 339 Mass. 252, 158 N.E.2d 875 (1959). There the court approved a clause in an agreement to arbitrate "in accordance with laws of New York."

²⁵ *Industrial Packaging Products Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960). See also *Atlas Credit Corporation v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960), for a case involving the old statute fixing choice of law rules under the Code.

section 9-103 of the Uniform Commercial Code.²⁶ This approach accords with other areas of choice of law. The agreement as to applicable law may bind the parties to the contract but cannot affect third persons.²⁷

2. "The choice of law statement was obtained by unfair means or was the result of mistake."²⁸ This exception would incorporate the general substantive rules of fraud, duress, and mistake. It makes clear that this provision of the contract would be subject to the same defense of overreaching or mistake as is every other provision of the contract.²⁹

The exceptions listed above have purposely omitted any discussion of public or local policy³⁰ as a reason for not applying the law selected by the parties.³¹ Local policy—no matter how strong for local fact situations—should not affect a transaction in which the parties have, under the conditions of section 1301.05, selected an applicable law. By hypothesis, we have a transaction involving commercial interests based upon an underlying transaction which bears a reasonable relation to several jurisdictions. The parties have selected the law of one of those jurisdictions to govern their rights and duties. That local policy

²⁶ This is Ohio Rev. Code § 1309.03 (1962).

²⁷ Perhaps this should not have been listed as an exception to Ohio Rev. Code § 1301.05 (1962). That section allows the *parties* to agree on the applicable law which is to govern *their* rights and duties. The most reasonable interpretation of this section is that their agreement is effective only as between themselves.

²⁸ This statement is taken from Restatement (Second), Conflict of Laws § 332a (Tent. Draft No. 6, 1960).

²⁹ Several persons have objected to party autonomy on the basis that it allows the party with the superior bargaining position to select the law most favorable to him. Within limits, this is true—just as he can dictate more favorable terms elsewhere in the contract. However, principles of fraud and duress and the equitable principles of sharp dealing, etc., set limits on the extent to which any part of a document will be enforced. Similar principles should be applied to the choice of law clause. See Ehrenzweig, *supra* note 9; Judge Frank's dissenting opinion in *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

³⁰ Public policy has been variously defined. The most quoted definition is found in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918), where it is stated that courts "do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." See Ohio cases cited in 9 Ohio Jur. 2d *Conflict of Laws* § 75 (1954). The term is used in this paragraph of the text as meaning a policy of the forum which leads the forum to refuse to entertain the plaintiff's cause of action. The term, "public policy," is sometimes used as a reason for the adoption of a choice of law rule which decides the case before the court. See Paulsen and Sovern, "Public Policy" in the *Conflict of Laws*, 56 Colum. L. Rev. 969 (1956).

³¹ See Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 Yale L.J. 1027 (1940).

would have affected an entirely local transaction is irrelevant. A multi-state—not a local—transaction is before the court. Indeed, the *policy* of any state which has adopted the Uniform Commercial Code now includes the idea of party autonomy (through its equivalent of UCC section 1-105); therefore, such a state no longer has a policy against litigating a choice of law case with these facts.³²

2. *Failure To Have Agreed on the Applicable Law*

When the parties to a commercial transaction subject to the Code have not agreed as to the applicable law or (presumably) when such a choice has been ineffective, then Ohio's Code is to be applied to transactions "bearing an appropriate relation" to Ohio. As pointed out above, the Code does not attempt to spell out solutions for transactions which have no "appropriate relation" to Ohio.³³ Evidently these are to be solved by common-law choice of law rules.³⁴

The Official Code Comment to this section does not attempt to distinguish between the "reasonable relation" which is a prerequisite to party selection of applicable law and the "appropriate relation" requirement of this provision.³⁵ This phrase, too, will have to be interpreted by courts as they are presented with fact situations having contacts with Ohio and with other jurisdictions. They will have to decide whether a particular fact or group of facts causes the transaction to bear this *appropriate* relation to Ohio. If Ohio is either the place of making or of performance, the court will undoubtedly conclude that this is an appropriate relation to Ohio.³⁶ Here, old conflict of law

³² A case in which public policy might still be used in multi-state transactions involving the Uniform Commercial Code is one in which the local policy prevents the forum from *listening* to or *entertaining* the case—as opposed to a policy against *enforcing* the rights and duties arising out of the case. Cf. with the *Loucks* case, *supra* note 30, *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936).

³³ See text accompanying note 3 *supra*.

³⁴ This results in three choice of law rules under the general paragraph of Ohio Rev. Code § 1301.05: (1) party autonomy; (2) application of Ohio law if there has been no effective choice by the parties and if the case bears an appropriate relation to Ohio; and (3) the usual choice of law rules if there has been no effective choice by the parties and if the case does not bear an appropriate relation to Ohio.

³⁵ Anderson concludes that it "is not believed that this stylistic variance was intended to produce a difference in construction." 1 Anderson's Commercial Code 16 n.20 (1961).

³⁶ The Official Code Comment states: "where there is no agreement as to the governing law, the Act is applicable to any transaction having an 'appropriate' relation to any state which enacts it. . . ." Under Ohio's language, the Ohio Code—and not the Code as adopted and interpreted by some other state—would be applied if the relation to Ohio is "appropriate." In this respect, the Official Comment is too broad.

The Comment goes on to state:

Of course the Act applies to any transaction which takes place in its entirety

rules can be used to bolster new choice of law words. However, if Ohio is only the place from which the offer was made, the place from which (or to which) the goods were shipped, or the residence of one or both of the parties, new trails will have to be blazed. The Official Code Comment indicates that old conflict of law rules refusing to apply a local rule are not binding, but that application of the Code (as local law) can be justified "by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries."³⁷ This will result in Ohio's new Commercial Code being applied to factual situations in which Ohio is the forum and which, prior to the Code's enactment, would not have been made subject to Ohio law.

This desire to apply local law because it is the "better" rule might make the job easier for local lawyers, but will often destroy the reasonable expectations of the parties to a transaction. This can be illustrated by two cases:

Case #1: Imagine a commercial transaction having contacts with Ohio and with a non-Code state. A question has arisen which is treated differently under the Code than it would be under the law of the non-Code state. Under which rule should the lawyer advise his client? If the lawyer decides that the transaction bears an "appropriate" relation to Ohio, his impulse will be to tell his client the substantive answer spelled out by the Code. If he pauses to consider the problem a little longer, however, he will realize that he has assumed that the question will be presented to an Ohio court. It may well be that the other party to the transaction will get the case into the court of the non-Code state and that that court will determine the answer by a traditional choice of law rule, which rule may well require reference to the substantive rules of a state other than Ohio.

In short, whenever a lawyer has a commercial case which involves contacts with a non-Code state, he has a double problem. Not only must he know what the local court would do under the Code, but he must also decide what the court might do in every state in which the suit may be brought. This happens when the framers of a new statute are interested in giving it its widest application. It is a kind of provincial justice which harkens back to

in a state which has enacted the Act. But the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

³⁷ This language is found in Comment 3 to UCC § 1-105.

the days when choice of law rules were beginning to emerge; strange that it should be coupled with a statute which recognizes the principle of party autonomy, thereby strengthening the policy of protecting the expectations of parties to a commercial transaction.³⁸

Case #2: The second case is like the first except that the commercial transaction may have contacts with Ohio and with another Code state. Now both states have the same choice of law test—"appropriate" relation—but *both* states *have* that appropriate relation to the transaction. To the extent that both states have variations in their Codes or in the interpretations of their Code, the same problem arises. Before the lawyer can advise his client, he must decide which law will be referred to by a court if litigation ensues. Since both states have that appropriate relation, he must first guess—and often it is a guess—which state will be the forum of that suit.

As the Code is adopted by more and more states, this second sentence of section 1301.05 will result in wider use of forum law. Plaintiffs will attempt to bring their suits in the state which gives them the more favorable result. Defense attorneys and their clients can predict results only after the suit has been brought. For the practicing lawyer, this approach to choice of law cases makes counseling extremely difficult. For the theorist, this application of local law represents the most blatant of provincialism.³⁹

THE SPECIFIC EXCEPTIONS

There are two paragraphs in Ohio Revised Code section 1301.05.⁴⁰ The first paragraph has been discussed. It gives the parties the right to choose their applicable law—under limitations already pointed out—and then provides that if the parties have not agreed on the applicable

³⁸ Goodrich, "Public Policy in the Law of Conflicts," 36 W. Va. L.Q. 156, 167-9 (1930):

It is not alone for the people who get into a lawsuit that we need to have our law of Conflict of Laws in certain terms. Of far more importance are the thousands of persons who seek to avoid litigation by a careful compliance with the law which is to govern their conduct. . . . But it is exceedingly necessary that if a New York contract comes before a court either in Michigan or West Virginia or Iowa or Kansas that the court apply the *same* rule of Conflict of Laws to determine the treatment which this foreign contract is to receive. If it does not, the parties will find that which they thought definitely and legally settled, varying according to the court in which questions between them may happen by chance to be raised.

This idea that the accident of the forum should not be decisive in the outcome of the case finds expression in several recent cases. See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Collins v. American Auto. Ins. Co.*, 230 F.2d 416 (2d Cir. 1956), *appeal dismissed*, 352 U.S. 802 (1956).

³⁹ See Rheinstein, "Conflict of Laws in the Uniform Commercial Code," 16 Law & Contemp. Prob. 114 (1951), for a discussion of a prior draft of UCC § 1-105.

⁴⁰ UCC § 1-105.

law, the Ohio Commercial Code applies to transactions bearing an *appropriate* relation to Ohio. The second paragraph of section 1301.05 contains limitations on the right of the parties to choose the law of the contract by stating the law which will be applied in five fairly specific cases. This paragraph begins with this phrase:

Where one of the following provisions . . . of the Revised Code specify [sic] the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

The provisions which follow (and which are discussed below) all emphasize the importance of situs law.

The addition of the phrase, "including the conflict of laws rules," in the general introductory paragraph will require the forum court to apply the whole law of the situs⁴¹ to determine whether an agreement selecting some law other than the situs law is effective. This should result in the forum court deciding the question of whether an agreement as to applicable law is effective as that question would have been decided had it been presented to a court at the situs. This method of solving a problem in conflict of laws has the support of the Restatement in areas involving title to land and the validity of divorce decrees;⁴² it has some support in the decided cases⁴³ and by the writers in law reviews.⁴⁴ Its inclusion in the Uniform Commercial Code should give wider acceptance to this method of solving a conflicts case.

1. Sales

The first specific limitation on section 1301.05 is found in Ohio Revised Code section 1302.43⁴⁵ which deals with the rights of the seller's creditors against goods sold but still in the possession of the seller. Section 1302.43 gives the buyer of goods the right to receive goods which have been identified to the contract⁴⁶ as against an

⁴¹ The "whole law of the situs" is to be distinguished from the internal or municipal law of the situs. The internal law is the law which a court at the situs would apply to a case having no out-of-state contacts; the whole law is the law which the situs would apply to the case now before the forum court—a case with out-of-state contacts. Thus, the phrase, "whole law of a jurisdiction," includes the choice of law rules of the jurisdiction referred to by the forum's choice of law rule under the Uniform Commercial Code.

⁴² Restatement, Conflict of Laws § 8 (1934).

⁴³ *In re Schneider's Estate*, 198 Misc. 1017, 96 N.Y.S.2d 652 (Surr. Ct. 1950); *In re Zietz's Estate*, 198 Misc. 77, 96 N.Y.S.2d 442 (Surr. Ct. 1950).

⁴⁴ The classic article is Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165 (1938).

⁴⁵ UCC § 2-402.

⁴⁶ The buyer is given the specific right to receive the goods on proper tender in the event of the seller's insolvency (§ 1302.46) and to the remedies of replevin or specific performance (§ 1302.90).

unsecured creditor of the seller, unless "retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated." Here is recognition of the control of situs law. There then follows a specific exception from what is to be considered a fraudulent retention of goods. This exception provides that possession which is retained *in good faith* and in the *current course of trade* by a merchant for a *commercially reasonable time* after a sale or identification is not fraudulent.

This exception will require interpretation by courts dealing with intrastate problems. There is, in addition, the choice of law problem presented by the interstate case. What facts must occur within a state having the Code before this exception becomes applicable? From the language of the entire section, it seems clear that the Code exception would apply only if the goods involved are located in a state which has adopted the Code. Thus, if the buyer and seller are residents of a Code state and their contract of sale was entered into in a Code state, but the subject matter of the contract was located in a non-Code state, then the exception (as to what is fraud) found in the Code would not be applicable. If the states were reversed, the exception would become the law of the case.

2. *Bank Deposits and Collections*

The second exception to the broad rules of party autonomy and the appropriate relation test is found in Ohio Revised Code section 1304.02.⁴⁷ This section provides that:

The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located. In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.

This section is broad enough to include problems dealing with the inception of the collection process through deposit, forwarding, presentment, payment, and credit of the proceeds.⁴⁸ Here the situs selected is that of the bank and should give courts (and parties) a workable and fairly certain rule. The rule was chosen because it was "imperative that one law govern the activities of one office of a bank."⁴⁹ However, if the Code is applicable to the case, section 1304.03⁵⁰ makes

⁴⁷ UCC § 4-102.

⁴⁸ Comment 2c to UCC § 4-102.

⁴⁹ Comment 2a to UCC § 4-102.

⁵⁰ UCC § 4-103.

it possible for the parties to vary the applicable law by agreement between the parties.

Until the Code has wider adoption, there will exist the common-law choice of rules as to bank items⁵¹—as well as the Code rule. This will cause difficulties for lawyers in counseling clients, unless the lawyer knows which court will be called upon to decide the case. This problem has already been discussed under the section dealing with failure to select the applicable law.

3. *Bulk Transfers*

Here is a still further recognition of the situs rule. The chapter on Bulk Transfers provides that its rules apply to "all bulk transfers of goods located within this state."⁵²

4. *Investment Securities*

The fourth statutory exception to section 1301.05 is found in Ohio Revised Code section 1308.05.⁵³ This section provides:

The validity of a security and the rights and duties of the issuer with respect to registration of transfer are governed by the law, including the conflict of laws rules, of the jurisdiction of organization of the issuer.

This rule is in accord with the usual common-law rule⁵⁴ on this subject and appears to be both a sensible and a workable rule.

This section contains the words "including the conflict of law rules." Undoubtedly, these words were included to make certain that the validity of the security and the rights and duties of the issuer of the security (as far as registration was concerned) would be governed by the whole law of the state of incorporation.⁵⁵ This is proper because

⁵¹ See, e.g., *Weissman v. Banque de Bruxelles*, 254 N.Y. 488, 173 N.E. 835 (1930); *St. Nicholas Bank of New York v. State Nat'l Bank*, 128 N.Y. 26, 27 N.E. 849 (1931). The rule of both of these cases is "rejected" by the Code. See Comment 2c to UCC § 4-102. In addition, the Code rejects the rule that the law of the place of endorsement should be referred to in order to determine the method of notice. Such a rule is "more theoretical than practical." Comment 2a to UCC § 4-102.

⁵² Ohio Rev. Code § 1306.01 (UCC § 6-102). Exemptions to the Code are provided in Ohio Rev. Code § 1306.02 (UCC § 6-103).

⁵³ UCC § 8-106.

⁵⁴ Restatement, Conflict of Laws § 53 (1934). *Tellenik v. Huron Copper Mining Co.*, 177 U.S. 1 (1899) (common-law case involving the power of the court at the state of incorporation to remove a cloud on the title of corporate shares.) See Annot., "Conflict of laws as to title and transfer of corporate stock," 131 A.L.R. 192 (1941); Annot., "Statutory requirements respecting issuance of corporate stock as applicable to foreign corporations," 8 A.L.R.2d 1185 (1949).

⁵⁵ See discussion in note 41 *supra*.

it attempts to prevent the accident of the forum from determining the outcome of the case.⁵⁶

5. *Secured Transactions*

The last specific choice of law rule covers secured transactions under article 9. Section 1309.02⁵⁷ provides that article 9 applies to "personal property and fixtures within the jurisdiction of this state." This section adopts the general—but certainly not unanimous⁵⁸—common-law choice of law rule for secured transactions and should be a workable rule. If the property is located in Ohio, then article 9 applies. Presumably, if the property is not within the jurisdiction of Ohio, then article 9 will not apply.

Section 1309.03⁵⁹ amplifies section 1309.02 and attempts to state specific rules with respect to three situations which have caused difficulty under prior law. These three situations involve:

- a. Accounts and contract rights;
- b. Mobile equipment and general intangibles; and
- c. Collateral brought into this state but subject to a security interest under the laws of some other state.

The principal question which will arise under section 1309.03 will involve the filing of financing statements. Should these statements be filed in Ohio or, in interstate transactions, should they be filed in all the other states having any connection with the transaction? Multiple-filing is often possible but, to the businessman, so onerous as to be impractical. Thus, the lawyer must know where the statement should be filed to protect his client against general creditors of the assignor. Until the Uniform Commercial Code is adopted in all fifty states, the

⁵⁶ Thus, if the state of the incorporation would refer the question of the duties of the issuer with respect to transferability of a security to the internal law of the jurisdiction where the certificate is located, Ohio should apply the same rule of decision. If Ohio does not refer to the choice of law rules of the state of incorporation but refers only to the internal rules of that jurisdiction, then the Ohio decision could be different than would be the decision of the court at the place of incorporation. In this way, the fact that the suit was brought in Ohio, rather than in the state referred to by the Code's choice of law rule, could change the result of the case. See Griswold, *supra* note 44. The inclusion of the words, "including the choice of law rules," should prevent this accident of the forum from determining the outcome of the case.

⁵⁷ UCC § 9-102.

⁵⁸ Thomas G. Jewett, Jr., Inc. v. Keystone Driller Co., 282 Mass. 469, 185 N.E. 369 (1933); Stumberg "Chattel Security Transactions and the Conflict of Laws," 27 Iowa L. Rev. 528 (1942). See Annot., "Conflict of laws as to chattel mortgages and conditional sales of chattels," 13 A.L.R.2d 1312 (1950).

⁵⁹ UCC § 9-103.

Ohio lawyer must operate under the mandate of the Code and the rules of filing now found in several other statutes.

Briefly, section 1309.03 provides:

a. *As to accounts and contract rights:* If the assignor has an office in Ohio in which he keeps records concerning the accounts or contract rights assigned, then Ohio's article 9 will determine (1) the validity and perfection of a security interest and (2) the possibility and effect of proper filing. If the office is located outside of Ohio, then the law of that jurisdiction, *including its choice of law rules*,⁶⁰ will make the determination.

b. *As to mobile equipment and general intangibles:* The choice of law contact for this subsection is the "chief place of business" of the debtor. The Code does not define these words. The Official Code Comment tells us that the chief place of business in a multistate enterprise is *not* the place of incorporation; it is "the place from which *in fact* the debtor manages the main part of his business operations."⁶¹

There is other ambiguous language in this subsection. This subsection applies only to goods "of a type normally used in more than one jurisdiction" if the goods are "classified as equipment or classified as inventory by reason of their being leased by the debtor to others." Otherwise, the law, *again including the choice of law rules*,⁶² of the jurisdiction where such chief place of business is located shall govern.

c. *As to collateral brought into Ohio but subject to a security interest under the laws of some other state:* This subsection recognizes the validity of out-of-state liens which have been perfected under the law of the jurisdiction "where the property was when the security interest attached." If the security interest was perfected before the property was brought into Ohio, the interest continues perfected for four months, during which time the debtor can file in Ohio. If the interest is filed *after* the four-month period, then it is perfected as of the date of filing. One important exception is made. If the parties to the transaction understood that the property would be *kept* in Ohio and if it was in fact brought into Ohio (for purposes other than mere transportation through Ohio), then the security interest must be perfected in Ohio.

The reported cases support the ideas expressed above.⁶³

⁶⁰ See discussion note 41 *supra*.

⁶¹ Official Code Comment 3 to UCC § 9-103.

⁶² See discussion note 41 *supra*.

⁶³ *Casterline v. General Motors Acceptance Corp.* 195 Pa. Super. 344, 171 A.2d 813 (1961); *Churchill Motors, Inc. v. A. C. Lohman, Inc.*, 16 App. Div. 2d 560, 229 N.Y.S.2d 570 (1962); *In re Dumont-Airplane & Marine Instruments, Inc.*, 203 F. Supp. 511 (S.D.N.Y. 1962). Pennsylvania Code held not applicable when out-of-state chattel mortgage was taken and recorded in sister state prior to effective date of Pennsylvania Code, *Bank v. Nieman*, 10 D. & C. 118 (Pa. C.P. 1955).

CONCLUSION

The basic section of the Uniform Commercial Code dealing with choice of law problems is Ohio Revised Code section 1301.05. This section recognizes the right of the parties to a commercial transaction to select the law which they desire to have govern their rights and duties—if the jurisdiction selected bears a “reasonable relation” to the transaction. Failing such selection, the Ohio court is told to apply the Ohio Code if the transaction bears an “appropriate relation” to Ohio. These provisions will tend to give wide effect to the Ohio Code for suits brought in Ohio. There will, however, be serious problems of predicting results before the forum of the suit is known. In this sense, the Code promotes litigation-filing rather than settlement of disputes without suit.

Within five of the eight remaining articles of the Code,^o there are specific sections seeking to solve specific conflict problems. These are in articles 2, 4, 6, 8 and 9. These sections select one relation as the appropriate one; thus, they are merely further definitions of our basic section.

Perhaps the Code will give more certainty to choice of law problems in the area of commercial transactions; the specific exceptions attempt to give us a kind of certainty. Its greatest advantage should, however, be in its attempt to allow parties to most commercial agreements to select their applicable law. This right—given haltingly and grudgingly by courts—now stands a good chance of becoming “the law of the land.”